UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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UNITED STATES OF AMERICA, Plaintiff, vs. MATTHEW HEARN, Defendant.	3:06-cr-00133-LRH-VPC ORDER

Before the court are Defendant Matthew Hearn's ("Hearn") motions for modification of sentence (Doc. #60), for appointment of counsel (Doc. #65) and for stay of transfer pending final adjudication of sentence modification (Doc. #66). The government has responded (Doc. #67). Hearn has replied (Doc. #68). Also before the court is the Report and Recommendation of the Probation Office.

I. Factual and Procedural History

On September 26, 2007, Hearn pleaded guilty to armed robbery ("Count 1") and carrying a firearm during a crime of violence ("Count 2"). On April 15, 2008, the court sentenced Hearn to 43 months in prison on Count 1 with a mandatory consecutive sentence of 84 months for Count 2. Hearn's 43 month sentence was to be served concurrently with the state sentence he was serving at the time. Hearn filed a notice of appeal following his sentence. The court of appeals later granted his motion for voluntary dismissal of that appeal.

On November 11, 2012, Hearn filed a motion for modification of sentence (Doc. #60). Hearn requests the suspension of his 84 month sentence for Count 2, proposing instead an

extension of his supervised release from 4 to 5 years. In support of his motion for modification, Hearn offers "newly discovered evidence:" (1) his attorney failed to file a written sentencing memorandum; (2) his attorney failed to negotiate and secure a plea agreement with the prosecution; and (3) Hearn has completed all of the rehabilitation programs available in state prison and that federal prison only provides duplicative programs. Doc. #60. Hearn filed further motions for appointment of counsel and for stay of transfer pending final adjudication of his motion for modification. Docs. #65, #66.

II. Discussion

While Hearn does not identify the legal basis for his modification request, the court construes his request as a petition under 28 U.S.C. § 2255. Pursuant to this statute, a prisoner may move the court to vacate, set aside, or correct a sentence if "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without justification to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255. Section 2255 actions must be filed within one year of one of four possible dates. The court here construes Hearn's petition as contending that it was filed within one year of "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(4).

Hearn cites his attorney's failure to file a sentencing memorandum and his attorney's failure to negotiate a favorable plea agreement as newly discovered evidence in support of his claim for ineffective assistance of counsel. To establish ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the petitioner was prejudiced as a result of this performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to show prejudice, the petitioner "must then establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Quintero-Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1995) (citing *Strickland*, 466 U.S. at 688-89).

Hearn's claim is doubly barred. First, it appears that Hearn's attorney *did* file a sentencing memorandum. Doc. # 41. And Hearn's knowledge of the terms of his plea agreement, rather than his knowledge of their legal significance, triggers the beginning of section 2255's limitations period. *Hasan v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001). Therefore, Hearn has not made the threshold showing that his petition is timely under section 2255(f)(5). Second, even if this evidence were newly discovered (and true), it does not demonstrate ineffective assistance of counsel because it does not show prejudice. Hearn's Count 2 came with a mandatory seven year sentence, which he received. *See* 18 U.S.C. § 924(c)(1)(A)(ii). Thus, Hearn cannot show that the result of his sentencing proceeding would have been different but for his attorney's conduct. Nor has Hearn identified any basis for a more favorable plea agreement. Finally, while Hearn's completion of various rehabilitation programs is admirable, it does not furnish a valid ground on which the court may modify his sentence.

Thus, Hearn's petition is time-barred under section 2255. Hearn has had an opportunity to respond, *Day v. McDonough*, 547 U.S. 198, 210 (2006), and therefore the court denies Hearn's petition. Because the court denies Hearn's petition, Hearn's motions for appointment of counsel (Doc. #65) and stay of transfer (Doc. #66) are denied as moot.

IT IS THEREFORE ORDERED that Hearn's Motion for Modification of Sentence (Doc. #60) is DENIED.

IT IS FURTHER ORDERED that Hearn's Motions for Appointment of Counsel (Doc. #65) and Stay of Transfer (Doc. #66) are DENIED as moot.

IT IS SO ORDERED.

DATED this 22nd day of August, 2013.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE